BAILEY, RILEY, BUCH & HARMAN

A LEGAL CORPORATION
RILEY BUILDING, STE 900
POST OFFICE BOX 631
WHEELING, WEST VIRGINIA 26003-0081

TELEPHONE (304) 232-6675
FACSIMILE (304) 232-9897

JOHN PRESTON BAILEY (ALSO ADMITTED IN OH)
ARCH W. RILEY, JR.
CHRISTOPHER PAULL RILEY
CHERYL DEAN RILEY
HARRY L. BUCH
ANNE DIECKMANN HARMAN (ALSO ADMITTED IN OH AND PA)
ERIC W. SANTOS (ALSO ADMITTED IN PA AND TX)

ARCH W. RILEY, OF COUNSEL

T. S. RILEY 1850-1936
JAMES B. RILEY 1894-1958
ROBERT J. RILEY 1899-1977
GEORGE G. BAILEY 1913-1989

September 20, 2005

Hon. Debra H. Scudiere, Esquire
President
The West Virginia State Bar
2006 Kanawha Boulevard, East
Charleston, WV 25311-2204

Re: ***Judicial Selection Committee***
Our File No. 0686.07

Dear President Scudiere:

I am writing to report on the activities of the Judicial Selection Committee, which held its final meeting on September 20, 2005.

As you know, the Judicial Selection Committee was appointed in July, 2004, by then President Charles M. Love, III to examine the process by which we select our judges in this State and to make any recommendations to the Board of Governors for changes or improvements to the system. Your Committee was made up of a diverse group of bar leaders from all over the State and with diverse practices and experiences.

Your Committee held its first meeting on December 8, 2005, and met seven (7) more times as a group. Early in the process, the Committee was divided into four (4) work groups to discuss various aspects of the process, each of which held a number of meetings. Thereafter, the Committee was divided into two subcommittees; a merit selection subcommittee chaired by Dean Fisher and an election subcommittee chaired by John Cooper. Each of these subcommittees also held a number of meetings of their membership. Many of these meetings were held at the Charleston offices of Bowles, McDavid, Graff & Love due to their videoconferencing ability, and I wish to express my appreciation to Immediate Past President Love for the use of the facilities.

Virtually all of the members of the Committee were concerned over the large amounts of money which have been expended in the campaign process, both recently in this State and in other states, and the effect that such expenditures have on the public's confidence in the court system. Unfortunately, it would appear that the State's ability to curtail large expenditures such as we saw in the last election may be greatly restricted by ***Buckley v. Valeo***, 424 U.S. 1 (1976).

Members were also concerned over the increase in inflammatory rhetoric that has invaded campaigns and the effect that ***Republican Party of Minnesota v. White***, 536 U.S. 765 (2002) and ***Republican Party of Minnesota v. White***, 416 F.3d 738 (8th Cir. 2005) may have on election campaigns. Under the latter decision, judicial candidates are allowed to directly solicit contributions and have permission to announce their views on issues and how they would vote on cases which came before their courts.

Both of the subcommittees produced reports to the full Committee which were thoroughly discussed and ultimately voted upon. Copies of the reports are attached to this letter.

At our last meeting, the Committee narrowly (8-7) approved the report of the merit selection subcommittee. This report calls for the Bar to seek an amendment to the West Virginia Constitution either: (1) adding merit selection as one of the methods of selection that may be adopted by the Legislature, or (2) rewriting the current provision to provide that judges shall be selected in a manner set forth by the Legislature and prohibiting a process that involves appointment/selection by the Legislature. It was the intent of the Committee that if merit selection were to be adopted that it would apply solely to the Supreme Court and any intermediate appellate courts that may be established.

If merit selection were to be adopted, the report further suggests that a statute be adopted which sets forth the specifics of the procedure. The report suggests a nominating committee made up of 13 citizens, with 2 lawyers elected by a vote of the Bar from each of the State's three congressional districts, 6 citizens, with one citizen from each congressional district selected by the Speaker of the House and one citizen from each congressional district selected by the President of the Senate. The final member would be designated by the Chief Justice of the West Virginia Supreme Court of Appeals and would serve as chairperson of the nominating commission.

The nominating commission would select and announce three nominees. After a public comment period, the Governor would then select one of the three nominees for a twelve year term. At the end of a justice's term on the Court, the seat would then become vacant.

The report further recommends that the same process be used to fill any mid-term vacancies that may develop in the circuit courts or family courts. For this purpose, the nominating commission would appoint two additional members, being a lawyer and a citizen from the circuit in which the vacancy exists.

The Committee clearly recognized that the enactment of such a system is problematic, but felt that our charge was to recommend the best system, not a politically expedient system. In the event that the Board of Governors or the Legislature determined not to adopt the recommendation of merit selection, the Committee voted to recommend the following recommendations of the election subcommittee:

1. That the Legislature adopt a public financing plan modeled after the North Carolina system for the Supreme Court and any intermediate appellate courts. This recommendation was adopted by a vote of 14-1.

2. That some entity, including possibly the State Bar, undertake the provision of a judicial voters guide to the media and to the voters of West Virginia for all contested judicial races. This has been done by either a mailing or by an insert in the Sunday papers. This recommendation was adopted by a vote of 15-0.

3. That the State Bar set up an Advertising Review Commission consisting of bar members and lay persons to review and comment on advertising in all judicial races, including advertising by candidates, political parties and other groups such as "527s". This recommendation was adopted by a vote of 12-2.

4. That the Legislature adopt non-partisan elections for Supreme Court races and for intermediate appellate courts. This recommendation was adopted by a vote of 9-6.

Two other suggestions considered by the elections subcommittee were rejected by the full committee at the recommendation of the elections subcommittee. These were the proposal for automatic recusal of judges that had received significant campaign contributions from one of the counsel or parties in the case and a proposal of a blackout period prohibiting advertising during a period before an election. The Committee and the subcommittee felt that the first proposal was open to manipulation and the second proposal would be a disservice since most voters do not focus on judicial races until immediately before an election.

In this report, I have attempted to present the high points of the Committee's actions. It is my intention to personally present this report to the Board of Governors at the October meeting. In addition, a minority report will be presented at the same meeting. Both the lawyer representing the minority and I will be glad to answer any questions at the meeting.

I would be remiss if I did not thank the members of the Committee for their participation in a lengthy process, their dedication to the topic, and, most importantly, for the collegial manner in which all meetings were held. Even though members may have disagreed on occasion, it was truly a pleasure to chair such a group.

Very truly yours,

John Preston Bailey

\jpb:sss
Enclosure

pc: Thomas R. Tinder, Esquire
Members of the Board of Governors
Members of the Judicial Selection Committee

Report from Sub-committee Considering Partisan Elections

This sub-committee is comprised of the following persons: John McCuskey, Cheryl Connelly, Eric Holmes, David Cecil and John Cooper. The members of the subcommittee agree that abuses in the use of large sums of money in the election process and campaign advertising is a significant problem in the method of selection of judges as it presently exists.

However, the sub-committee was unable to reach a unanimous decision on which system for judicial selection would best serve the public interest.

Majority Report: The majority of the sub-committee have reached a consensus that there is no reason to change partisan elections at either the Supreme Court or the Circuit Court levels. The majority is comprised of Eric Holmes, David Cecil, and John Cooper. It is the sub-committee majority opinion that fundamental principles of democracy dictate that the electorate should select judges, not committees, governors, legislators, or other entities. Indeed, the majority have grave concerns that a greatest risk of abuse and undue political influence exists when the selection process is delegated to any person or group other than the entire electorate. A review of the Federalist papers discloses that one primary reason the Founding Fathers adopted presidential appointment of federal judges rather than electing them was the lack of efficient and prompt communications between the several states. A majority of the sub-committee believe that such impediment no longer exists and the public has immediate access to relevant issues and matters for the election of judges.

In addition, and just as importantly, the majority believe that any attempt to allow one or any combination of other branches of government to select or even influence the selection of the third co-equal branch of government destroys the very checks and balances intended by the Federal and State Constitutions.

Moreover, the majority further believe that the use of partisan elections provides the best opportunity for educating the electorate as to the qualifications and character of particular judicial candidates. This view is held notwithstanding the negative, and sometimes false, political advertising that permeated the most recent Supreme Court election. Indeed, it is perceived that partisan public debate and scrutiny best reveal the strengths and weaknesses of particular judicial candidates even in the presence of negative campaigning and political advertising.

One method of reducing the harmful influence of vested monied interests would be to adopt a publicly financed method of judicial selection. The majority recognize that 1st Amendment limitations upon regulation of political advertising may override the intended protections afforded by public financing of elections. However, public discourse by the entire political constituency in every judicial election is of far greater importance than allowing the process to be delegated to the select few. Vested interests could have far greater influence on judicial selection with less money spent by convincing one or a few individuals of the merits of their favored candidates. The most pressing problem facing judicial elections is the ability of monied interest groups to influence and control elections through a process which now provides limited controls and checks on when, where, and how much money is used. Money is the evil in the selection process, not political parties. No matter what system is involved, vested interests can invoke their influence. If money continues to play an adverse role in judicial selection, it is far better that it be spent in the open electoral process where the public is aware of its influence

rather than behind closed doors.

For the foregoing reasons, the majority of this sub-committee recommend that partisan election of judicial candidates be retained. They further suggest that the issue of campaign financing be addressed by the ful committee.

Minority Report: John McCuskey and Cheryl Connelly favor merit selection of both Circuit Court judges and Supreme Court justices. Selection would be made by a committee whose members are appointed by the Governor, the State Bar, and the Legislature. The committee would submit three recommendations for each judicial post to the Governor for selection. Terms for Circuit Court judges would be six years, for Supreme Court Justices, ten years. At the end of his or her term, a judge or justice could be considered for an additional term by the selection committee on the same basis as any other candidate. There would be no retention election.

Report on Nonpartisan Election

The first election that I followed with interest was the presidential election in 1960 between John F. Kennedy and Richard M. Nixon. The state of West Virginia was an important test state for President Kennedy's "electibility" and his victory in West Virginia was important in his ultimately winning the primary. While West Virginia was an important primary state, many political observers believe that the presidential debates between Nixon and Kennedy played a significant role in President Kennedy's winning the general election. In the years that have followed, the use of the media, particularly television, has become progressively more sophisticated by those interested in influencing the minds of voters and the outcomes of elections. Campaign managers seek photo opportunities and messages have to play well as "sound bites." The increased use of polling on issues has helped to focus the expenditure of campaign funds. Negative campaigns and attack ads have become a part of each election season, and access to large sums of money has become a reality of successful campaigns.

While such "modern" campaign techniques and strategies for judicial elections have tended to lag behind presidential campaigns, the most recent election in West Virginia demonstrates that attack ads have become a part of the election of judges. The experience in some other states illustrates that what happened in West Virginia is not an isolated occurrence.

While some believe that the last election for the Supreme Court justices in West Virginia was an anomaly, I fear that such is not the case. I believe that in the not too distant future those interested in certain issues will try to solicit pledges from candidates for judicial offices on certain issues or some candidates seeking to secure the support of particular groups will commit to certain positions to secure support for their campaigns. Such campaign commitments have become possible following the United States Supreme Court case in Republican Party of Minnesota v. White, which permits candidates for judicial election to speak to issues that may come before the Court. In the event this should occur, the support that the courts have traditionally enjoyed in this country as being fair and impartial arbitrators of issues will quickly erode, and in my judgement such a development would be very detrimental to the public's confidence in the judicial system.

I, therefore, worry that what we have experienced in West Virginia in the last Supreme Court election and what other states have experienced in similar circumstances is not a one time occurrence but a new reality in judicial elections and will continue. I believe an analogy of the effect of such negative campaigns can be drawn to lawyer advertising and how it has changed the public's perception of the legal profession. While the concerns that I worry about are fed by large expenditures of money, I believe it is the system that has produced the need for the expenditure of large sums of money to conduct successful campaigns.

Therefore, I believe that the use of nonpartisan elections will somewhat reduce the concerns that I have expressed above as compared with partisan elections. I believe that the literature that speaks to the advantages that party labels provide to the voters as to what a particular candidate stands for does not ring true in West Virginia where there exits a wide

spectrum of political philosophies and opinions within both the democratic or republican party. While my concerns are also applicable to circuit judge elections, I recognize that in order to increase the possibility of reform legislation it may be necessary to separate the Supreme Court elections from the circuit court elections. If, in fact, nonpartisan elections work at the Supreme Court level, at some future time the issues of the circuit court elections could be addressed.

While a constitutional amendment would be necessary to move to a system of merit selection of judges, I believe that a properly structured merit appointment system would be the preferable method to select judges. While I fully appreciate that "politics" will not be fully removed from the process by the appointment of judges, I believe the merit appointment system would be most successful in minimizing the influence of "single issue politics" from the selection process and would, therefore, help to create the greatest sense of public confidence in the judiciary. I do acknowledge with concern what is happening in the federal system with the appointment of federal judges, but also note that within the federal system the confirmation by the senate has tended to hinder the creation of litmus test that judicial candidates must pass.

In closing I note that through the readings that have been provided to us and the discussion by the committee, I recognize there are advantages and disadvantages to every method of selection. However, I believe that given the political climate that exists as we move into the 21st century, we need to have a method of selecting judges that gives our citizens the greatest confidence that the judicial system will provide a fair and impartial way to resolve disputes on the basis of the facts presented and fair and impartial application of law.

WEST VIRGINIA STATE BAR
JUDICIAL SELECTION COMMITTEE
MINORITY REPORT

This report is submitted as a Minority Report from some members of the Judicial Selection Committee in response to the Majority Report prepared by the Chairman, John P. Bailey, after the final meeting of the Committee.[1] This report will focus primarily on the one issue which fostered the liveliest debate and resulted in a split decision among the membership: whether the State should change its Constitution to permit appellate judges to be appointed by the governor? The Majority Report concludes that such a change is appropriate and would recommend that the Board of Governors do likewise. The Minority recommends that judicial elections be retained. It strongly opposes any form of judicial selection other than through elections. It vehemently opposes any system that would delegate judicial selection to political appointments - whether by the Governor, the Legislature, and/or a committee charged with evaluating the qualifications of candidates. Such a Constitutional change would not only deprive West Virginia Citizens of their cherished right to vote for high public officials, but it would also offend the notions that the three branches of government be co-equal and that the judiciary remain wholly independent from the other branches of government. We will address these issues first.

We also will address a number of potential election changes that the Board of Governors will hopefully consider in deciding what improvements to the election of judges that the West Virginia State Bar might suggest to the public and to the Legislature. Among the topics we will address in this Minority Report are the following items which were discussed by the Elections Subcommittee as possible areas of reform in judicial elections which the Board of Governors might wish to consider.:

(1) Campaign Finance Reform;
(2) Public Education through Voter Guides in Judicial Elections;
(3) Advertising Review Commissions;
(4) Blackout Periods Restricting Candidate Advertising Prior to Judicial Elections;
(5) Recusal of Judges in Cases Where Litigants or Their Counsel Have Made Political Contributions to Election Campaigns;
(6) Reforms in Disclosure Requirements and Campaign Contributions to "527" Political Organizations.

The Minority strongly supports items 1, 2, 3, and 6 above. However, since the Legislature just passed legislation in its most recent Special Session to address "527's", no recommendation is made herein. The Minority has reservations about items 4 and 5 which will be addressed below.

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[1] This Minority report is filed on behalf of the following members of the Judicial Selection Committee: Kathryn R. Bayless, J. David Cecil, William E. Harvit, Eric J. Holmes, G. Nicholas Casey, and John W. Cooper. Mr. Holmes was absent on the day the final votes were taken, but wishes to join in this Report to express his position. Mr. Casey was unable to arrive at the meeting until after the final votes were taken, but wishes to join in this Report to express his position.

1. History of Current Judicial Selection Committee.

The Judicial Selection Committee was formed for the purpose of identifying problems associated with the current system, evaluating viable alternative methods and procedures, determining the feasibility of such alternatives and recommending changes to the Board of Governors. This committee spent numerous hours discussing alternative methods and procedures in selecting judges and justices. It even discussed at length the specific wording of a proposed Constitutional amendment. However, with the exception of discussions regarding the need to eliminate money and politics from the selection process, principally as a result of meanspirited, mudslinging advertising involved in the last election, it failed to identify any problems associated with the present system to justify its recommendation for the appointment of judges and/or justices.

Because overwhelming support existed within the Committee for three recommendations of election reform if election of judges should continue only brief discussion in this Minority Report will focus on them. Indeed, these recommendations are strongly supported by the Minority and were advanced by its members during the proceedings in the Elections Subcommittee.

The proceedings of the Judicial Selection Committee occurred over a period of nine months. Multiple meetings and subcommittee meetings convened. There were two distinct but related segments of the proceedings. The first consisted of the Chairman appointing four distinct subcommittees to discuss and consider separate concepts of judicial selection: (1) the retention of partisan elections; (2) changing to non-partisan elections; (3) merit selection of judges; (4) retention elections for appointed judges. The make-up of each of these subcommittees, however, was not an indication that all of the subcommittee members favored or supported that particular method of selection or retention of judicial candidates. Indeed, each subcommittee was comprised of appointees who held sometimes diametrically opposite perspectives and opinions on the issues which the subcommittee was to consider.[2] Hence, the efficacy of each subcommittee in achieving its objectives may be questioned. Each submitted a report of its findings and recommendations. The second segment of the proceedings followed when the Chairman next divided and appointed the members into two surviving subcommittees: (1) a Merit Selection subcommittee and (2) an Elections subcommittee. Again, the make-up of each of these subcommittees was not fully comprised of members who favored or supported that particular method of selection of judicial candidates. Again, some might question the efficacy of trying to reach a consensus when sharp differences existed between the views of the respective members. At the conclusion of discussion and debate, each of these subcommittees tendered a report to the entire Judicial Selection Committee. At the final meeting on September 16, 2005, votes were taken on several issues which form the basis for the Majority Report. It should be noted that the primary debate centered on whether the Committee would recommend the

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[2] For example, the Partisan Election Subcommittee was comprised of 5 members, 3 of whom favored retention of partisan elections, and 2 of whom favored merit selection.

continuation of election of judges or converting to an appointment method. On that issue there was substantial division: with fifteen (15) members voting in person or by letter, eight (8) favored the adoption of a Constitutional amendment to permit the appointment of judicial candidates by the governor while seven (7) opposed abolition of the existing system of election of judges. Three (3) members did not attend or submit position letters on the issue. Clearly, the results were not a mandate for change. Instead, the final tally was nearly equally divided. Similarly, on the question of whether elections of supreme court justices should be partisan or non-partisan if the Board of Governors does not favor adoption of political appointments, the committee was strongly divided. Nine (9) favored non-partisan elections while six (6) favored partisan elections.

Notably, the Judicial Selection Committee did reach overwhelming agreement on several important recommendations if partisan or non-partisan elections are retained: By a 14-1 margin the Committee favored recommending that legislation be enacted to pursue public financing of election of candidates for the state supreme court and any intermediate court of appeals which may be created. The bill would be patterned after the North Carolina model. By a 14 -0 vote, the Committee favored recommending that some entity, possibly the State Bar, undertake preparation of a judicial voter's guide to the media and to the voters for all contested judicial races. The method would be by a mailing and/or by insertions into Sunday newspapers. By a 12 -2 vote (with 1 abstention), the Committee voted to recommend that the State Bar establish an advertising review commission consisting of bar members and lay members to review and comment on advertising in all judicial races, including advertising by candidates, political parties, and other groups such as "527's".

2. Political Appointment of Judges

The Majority Report labels its recommended alternative to the election of judges as "merit selection". The phrase is a convenient euphemism for what is really proposed: the political appointment of judges to replace the election of candidates. The Minority believes that replacing the franchise of West Virginia citizens with political appointments by the governor will do nothing to eliminate the impact of unlimited financial contributions and influence on judicial selection. Indeed, changing to the appointment method may make it easier for vested wealthy power brokers to pander their influence upon one or a handful of persons than currently is necessary to influence the entire electorate. And that pressure will generally be exerted beyond the watchful eyes of investigative journalists and other forms of public scrutiny.

Even if a special commission is established to recommend individuals for judicial appointment, the members of that commission are themselves individuals with political perspectives, are answerable to those who appointed them, and are likely to recommend individuals who are politically and philosophically aligned with their views. Professional, personal and party politics will be played out within any nominating commission and at the gubernatorial level, if, as proposed, the governor makes the final selection.

The Minority finds distasteful the expensive negative advertising which recently surfaced in the state supreme court races, but it submits that tolerance of such offensive political advertising is nonetheless better than permitting power brokers who made smaller contributions to influence the governor and the "selection committee" in smoke-filled rooms behind closed doors. Both the Majority and the Minority agreed upon one overriding premise during these months of analysis and debate: that the unregulated, unrestricted expenditure of millions of dollars in negative campaign advertisements by "527" political organizations has undermined public confidence in the judicial system. These organizations were not required to disclose their donors or members, they had no spending limits, and they frequently used their funds to promote character assassination and distortion in political ads in the 2004 general election race for state supreme court. But the Majority mistakenly believes that the solution is to abolish the franchise rather than to require "527's" to adhere to election scrutiny, financial contribution limits, and public disclosure. The problem with "527's" was discussed at length both in subcommittee meetings and by the judicial selection committee as a whole, but no formal action was introduced largely because of concerns about the constitutionality of possible remedial legislation. However, it is significant to note that within the last two weeks the West Virginia Legislature may have remedied this problem by passage of a new statute directed at most of the abuses which the Committee had recognized.[3]

It is the minority opinion that fundamental principles of democracy dictate that the electorate should select judges – -- not committees, governors, legislators, or other entities. Indeed, the minority harbors grave concern that a greater risk of abuse and undue political influence exists when the selection process is delegated to any person or group other than the entire electorate.

West Virginia was founded on principles of rugged individualism and democracy. There is no right more fundamental within our democracy than the enjoyment of the right to select our public officials by the vote of Her citizens. The suggestion that a committee dominated by lawyers and judges would be better able or qualified to determine the qualifications and character of judicial candidates than the people as a whole is elitist, if not somewhat arrogant. To replace the existing system with political appointees by the governor would only further reduce public confidence in the judicial system. Some have suggested that the federal appointment of the judiciary provides sufficient basis for the state to change our state constitution to permit political

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[3] Only days prior to the last meeting of the Committee, the West Virginia Legislature sitting in special session enacted a comprehensive statute which may serve as a model nationwide by addressing the very concerns which the Committee identified: the obscene expenditure of funds to purchase negative political ads by "527's" in the last election. It appears that limits were placed on individual financial contributions to such organizations and the donors must be identified. This legislation was adopted so recently that the Committee did not have the opportunity before the final action of this Committee was taken to analyze whether it will withstand 1st Amendment constitutional challenge. If it does pass constitutional muster it will likely become the model act nationwide.

appointment of judges. But the federal experiment does not lend credence to such an argument. The current hearings before the United States Senate on the appointment of a new chief justice of the United States Supreme Court reinforces the merits of the Minority view that judicial appointments are political by their very nature. Likewise, the history of Supreme Court appointments over the last century reveals the political influence of appointments.[4] In analyzing the reasons for presidential appointment of public officers under the federal system over election, one might look to the writings of our Founding Fathers for guidance. A review of the Federalist papers discloses that one primary reason the drafters adopted presidential appointment of federal officials rather than electing them was the lack of efficient and prompt communications between the several states.[5] We believe that such impediments no longer exists as the public has immediate access to relevant issues and matters for the election of judges. Indeed, the numbers and dispersal of citizens no longer present a barrier to prompt and easily managed elections. With the advent of electronic communication, electronic media, electronic advertising, and electronic voting, Hamilton's concerns about reposing selection of officers no longer presents the same hurdles as existed in 1789.

In addition, and just as importantly, the Minority suggests that any attempt to allow one or

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[4] The Minority does not suggest that Judge Roberts is unqualified to assume the position, but it urges that the process by which he was selected is partisan politics at its genesis. We also remind the Majority of the "court-stacking" efforts of FDR in the 1930's and the more recent efforts by some Republican administrations to load the federal courts with appointees sometimes having espoused very conservative agendas rather than promising a commitment to follow well-established judicial precedents and to exercise judicial restraint. Such appointments are by their very nature highly political and they pose a continuing risk to preserving the constitutional separation of powers between the executive and judicial branches of government.

[5] In Federalist Paper No. 76, Hamilton cautioned that appointment was necessary because in any given presidential term of office too much time would be exhausted in trying to conduct elections:

> "It will be agreed on all hands, that the power of appointment, in ordinary cases, ought to be modified in one of three ways. It ought either to be vested in a single man, or in a select assembly of a moderate number; or in a single man, with the concurrence of such an assembly. The exercise of it by the people at large will be readily admitted to be impracticable; as waiving every other consideration, it would leave them little time to do anything else. When, therefore, mention is made in the subsequent reasonings of an assembly or body of men, what is said must be understood to relate to a select body or assembly, of the description already given. *The people collectively, from their number and from their dispersed situation, cannot be regulated in their movements by that systematic spirit of cabal and intrigue, which will be urged as the chief objections to reposing the power in question in a body of men.*" (Italics emphasis added)

any combination of other branches of government to select or even influence the selection of the third co-equal branch of government destroys the very checks and balances intended by the Federal and State Constitutions. Again, in the Federalist Papers, it is urged that utmost care be taken to assure that the three branches of government be co-equal and that particular care be taken not to allow interference with an independent judiciary.[6] The Majority recommendation will serve as the first step in weakening the independence of the Judiciary.

For more than 130 years, the people of West Virginia have elected their judges and justices. It is this—more than anything else—which ensures the independence and integrity of the state judicial system, allowing it to safeguard the rights guaranteed in our state Constitution and laws. When the West Virginia Supreme Court of Appeals determines the constitutionality of actions by the executive or legislative branches or interprets the laws passed by the legislature, it must be answerable first to the people of West Virginia. It is critical that the courts remain separate, distinctive and independent.[7]

Interestingly, the Majority Report does not conclude that the elections produce judges who do not possess the requisite intellect. It does not conclude that elections produce judges who do not possess the requisite judicial demeanor or temperament. It does not conclude that elections produce judges who do not possess the requisite integrity. It does not conclude that elections produce judges who do not possess the requisite diligence. It does not conclude that elections produce judges who do not possess the requisite reasonableness or fairness. It does not conclude that elections produce judges who do not possess the requisite upstanding character. It does not conclude that elections prevents minorities from being represented on the bench. In fact, the report fails to identify a single problem with the election system. It also fails to explain how the appointment of judges would eliminate money and politics from the selection process. Moreover, it fails to identify, in any manner whatsoever, how an appointment system would be better than the election method. Instead, the Majority makes a recommendation to change our constitution without offering any legitimate basis upon which to rely.

There is debate within the Judicial Selection Committee as to whether the retention of elections should be in partisan or non-partisan form in judicial elections. At least five (5) members of the Minority submit that there is no valid reason to abolish partisan elections in judicial elections. They urge that the Board of Governors consider that removing political party designations from judicial races does not remedy the problem. Non-partisan judicial elections can be just as expensive and just as ugly as partisan campaigns. In 1994, Mississippi switched from partisan to non-partisan elections in judicial races. That change did nothing to limit the vast

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6 Hamilton, *Federalist Paper No. 78.*

7 "Position Paper on Judicial Selection of Judges", West Virginia Trial Lawyers Association, 2005.

amounts of money in Mississippi elections or the negative attacks in the campaigns.[8] Indeed, it was a Mississippi Supreme Court race, under its system of non-partisan elections, that was featured in the *Forbes* magazine article, "Buying Justice." The magazine stated that the race was a "down-and-dirty, name-calling campaign" with the winner "bankrolled by $1.2 million" and aided by a $1 million campaign by the U. S. Chamber of Commerce.[9]

Party affiliations provide most voters with a general idea where candidates stand on certain issues, allowing the electorate to be better informed. Partisan elections help ensure that state and county party leaders find qualified candidates for each seat in the election, and candidates benefit from campaign resources provided by party organizations. In contrast, there is no evidence that allowing candidates to run without their party affiliations would have any beneficial impact on the judicial selection process.[10]

3. Campaign finance reform.

The Minority agrees that public perception concerning judicial selection and the judicial process was negatively affected by the excessive financing and negative advertising campaigns that existed in the most recent Supreme Court election cycle. The Minority favors recommendation of campaign financing legislation patterned after the the North Carolina model which was recently enacted and implemented. That model imposes fund raising and spending limits for supreme court and other appellate judicial offices. The Minority strongly endorses recommending legislative enactment of public financing of judicial elections at the Supreme Court level. The method of financing can be generated from four possible sources: (1) legislative appropriation; (2) income tax check-off by taxpayers; and (3) voluntary contributions

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[8] *See* "Partisan to Non-Partisan Elections in Mississippi," Judicial Selection reform: examples from Six States, American Judicature Society 2003 at 32 ("Judicial elections in Mississippi since 1994 have led some to question whether moving from partisan to nonpartisan elections was an effective response to reformers' concerns about the selection process. The reform did not address the financing of judicial elections, and the cost of campaigns continued to rise.")

[9] Lenzner, Robert and Miller, Matthew, "Buying Justice ," Forbes, 7/21/03.

[10] "Position Paper on Judicial Selection of Judges", West Virginia Trial Lawyers Association, 2005

from citizens to a state "election" fund, not designated to a particular candidate;[11] (4) from a dues check-off from the State Bar. Such contributions to a general election fund might also be made by other groups, but such funds contributed from voluntary donors would not go to specific candidates -- rather to the election fund administrator who would distribute them on an equal basis among qualified participating candidates. One method of implementing and overseeing public financing of judicial elections might be to utilize the Secretary of State's office as administrator of the public campaign fund– since it has election supervision and regulation as part of its statutory duties.

Another issue is whether participation in a publicly financed judicial election should be mandatory or voluntary. In North Carolina, it was voluntary. However, the Minority recommends that the decision on whether the system should be voluntary or mandatory should be decided by the Legislature.

In order to fairly apportion funds among candidates, it is suggested that a minimum number of signatures be required on a petition of voter support for a candidate in order for the candidate to qualify for public financing. As an alternative means of determining eligibility for public financing, the candidate might have to demonstrate some level of financial contributions, although this may be tantamount to a return to the potential abuses of the system which presently exists in West Virginia.

4. Voter Guides - Public Education Programs.

The Minority recommends strongly the creation of voter guides as another related component of judicial election reform that might be adopted. Such a guide might provide a resume of each candidate that would be submitted to a regulatory body for editing, printing, and distribution. Candidates would be permitted to submit data to the body in order to provide relevant background information. Some feel that the Secretary of State might be considered as the appropriate body to assemble, edit, and distribute the voter guides while others favor having the State Bar assume that role. The goal would be to provide voters with solid, unvarnished information about judicial candidates.

It should be noted that North Carolina again has pioneered the publication of a voter guide: In 2004, 3.9 million copies were distributed (1 to every residential address in the state.) The voter guide was funded by several sources: (1) $220,00.00 from the campaign fund (mostly from the income tax check-offs); $248,500.00 from grants; (3) $25,000.00 from Capital Broadcasting; and (4) $5,000.00 from the North Carolina Bar Association.

The Minority also believes that additional public education about the judicial process is desirable at the secondary schools level to give citizens a better understanding of how the system functions. The Minority notes that the Young Lawyers Section of the West Virginia State Bar

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[11] In North Carolina, public financing applies not only to the Supreme Court candidates, but also to appellate judges and other statewide officers.

is considering ways to assist in the teaching of the Constitution in the public schools of this State and its efforts should be supported.

5. Advertising Review Commission.

The Minority strongly favors recommending establishment of an advertising review commission which would be given the task of promptly reviewing broadcast and media ads. One facet of such a program might require that candidates submit proposed advertisements to the commission prior to airing the same. However, care must be given in determining who would comprise the commission, the merits of its objectivity in analyzing ads, its ability to respond quickly, and the nature of any report it generated which credits legitimate political ads or discredits false and misleading ads. To restore public confidence in the system, some participation by lay members and bar members is recommended. Also, it is important that any report from the Commission must occur promptly and prominently so that the damage caused by false or misleading ads might be quickly addressed in the media.

6. Advertising Blackout Periods.

Another method of improving judicial elections might be to impose a "blackout" period for airing broadcast ads that refer to candidates. The Elections Subcommittee considered recommending advertising blackout periods patterned after the North Carolina model, but no affirmative action was taken on this issue in either the subcommittee level or at the Committee as a whole level. There were concerns about how long in advance of an election the blackout should begin. There were also some concerns about the constitutionality of blackout periods. Should the Board of Governors decide to propose such action, the Minority recommends that it consider the following: if such a measure were adopted, it should be limited to "reasonable time" prior to primary, general and special elections. Such a law might be patterned after the McCain-Feingold federal act and after another recent North Carolina statute.[12] The North Carolina model restricts such ads for 30 days prior to primaries and 60 days before general and special elections. Some members of the Committee felt that those time periods were excessive and some members proposed establishing a "blackout" period of 2 weeks prior to elections.

7. Automatic Recusal from Cases Before Judges to Whom a Party or Lawyer Has Made a Contribution.

This proposal was considered by both the Election Subcommittee and the entire Judicial Selection Committee. The concept was rejected by the Subcommittee and no action was taken by the entire Judicial Selection Committee. The State of Alabama has tried successfully to implement such a recusal plan.[13] Although in concept some members of the Minority believe it

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12 ABA Journal,"Reforms That Work", Feb. 2005, p. 44

13 Alabama Code, §§ 12-24-1; 12-24-2

to be desirable, others fear that too much potential for abuse and manipulation exists From the standpoint of public perception, constituents may believe that judges will likely favor those who contribute to their campaigns in political campaigns. From that perspective, recusal may seem appropriate. But there is a serious potential problem if recusal is required when a party or lawyer manipulates the process. (I.e., one could cause the recusal of a judge he dislikes by making a contribution to his campaign. Such a requirement could cause mischief in the judicial process.) Hence no recommendation is made on this issue.

8. Regulation of "527" Political Organizations Endorsing or Opposing Judicial Candidates.

As pointed out in Section 2 and footnote 3 above, the Judicial Selection Committee expended considerable time discussing the negative aspects of "527" organizations in the 2004 West Virginia Supreme Court race. The Committee was hesitant to make formal proposals because of 1st Amendment considerations. However, because the Legislature has just passed House Bill 402, no additional action is recommended by the Minority at this time.[14] For information purposes the new statute provides a variety of new regulations which will limit contributions, identify contributors and officers of "527's", require timely disclosure, and a number of other helpful provisions.[15]

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[14] West Virginia Legislature, 4th Special Session, passed September 13, 2005, sent to Governor on September 16, 2005.

[15] It defines electioneering communication as follows: "Electioneering communication" means any broadcast, cable, or satellite communication; communication in any newspaper, magazine or other periodical publication; communication sent by mass mailing; communication by telephone bank; or communication by leaflet, pamphlet, handbill or flyer, that has all the following characteristics:
(i) Refers to a clearly identified candidate for a statewide office or the legislature.
(ii) Is publicly distributed within one of the following time periods:
(a) sixty days before a general or special election for the office sought by the candidate, or
(b) thirty days before a primary election for the office sought by the candidate.
(iii) Is targeted to the relevant electorate.

It requires that every person who has spent a total of five thousand dollars or more for the direct costs of purchasing, producing or disseminating electioneering communications during any calendar year shall, within twenty-four hours of each disclosure date, file with the Secretary of State a statement which contains: (1) The name of the person making the expenditure, the name of any person sharing or exercising direction or control over the activities of the person making the expenditure and the name of the custodian of the books and accounts of the person making the expenditure; (2) If the expenditure is not made by an individual, the principal place of business of the partnership, committee, association, corporation, organization

or group which made the expenditure;
(3) The amount of each expenditure of more than one thousand dollars for electioneering communications during the period covered by the statement and the name of the person to whom the expenditure was made;
(4) The elections to which the electioneering communications pertain and the names, if known, of the candidates identified or to be identified therein; and
(5) The names and address of any other contributors who contributed a total of more than one thousand dollars between the first day of the preceding calendar year and the disclosure date and whose contributions were used to pay for electioneering communications.
(b) With regard to the contributors required to be listed pursuant to subdivision (5), subsection (a) of this section, the statement shall also include:
(1) The month, day and year that the contributions of any single contributor exceeded two hundred fifty dollars;
(2) The name and address of the contributor and, if the contributor is a political action committee, the name the political action committee registered with the State Election Commission;
(3) If the contributor is an individual, the name and address of the individual's current employer and occupation, if any, or, if the individual is self-employed, the individual's occupation and the name and address of the individual's business, if any;
(4) A description of the contribution, if other than money;
(5) The value in dollars and cents of the contribution.
(c)(1) Any person who makes a contribution for the purpose of funding the direct costs of purchasing, producing or disseminating an electioneering communication under this section shall, at the time the contribution is made, provide his or her name and address to the recipient of the contribution;
(2) Any individual who makes contributions totaling two hundred fifty dollars or more between the first day of the preceding calendar year and the disclosure date for the purpose of funding the direct costs of producing or airing electioneering communications shall, at the time the contribution is made, provide the name of the his or her current employer, if any, or, if the individual is self-employed, his or her occupation and the name of his or her business, if any, to the recipient of the contribution.
(d) In each electioneering communication, a statement shall appear or be presented in a clear and conspicuous manner that:
(1) Clearly indicates that the electioneering communication is not authorized by the candidate or the candidate's campaign committee; and
(2) Clearly identifies the person making the expenditure for the electioneering communication. Provided, That when an electioneering communication appears on or is disseminated by broadcast, cable, or satellite transmission, the statement required by this subsection must be spoken clearly and appear in clearly readable writing at the end of the communication.
(e) Any coordinated electioneering communication is an in- kind contribution, subject to the applicable contribution limits prescribed in sections eight and twelve of this article, to the candidate by the person paying the direct costs of producing or airing the communication.

8. Summary.

The Minority Members urge the Board to look seriously at the recommendations made by the Elections Subcommittee in the introductory paragraph of this Report. These included the implementation of a public financing plan; the development of judicial voter guides; and the establishment of an Advertising Review Commission. Although the Minority is divided by close margin on whether elections should be partisan or non-partisan, the Board is urged to recommend retention of some type of election of judicial officers. Under the West Virginia Constitution, since the Legislature is already provided with authority to decide whether to utilize partisan or non-partisan elections, there may be no need to recommend a change in the current election system. Further, the Board may wish to consider whether it also wishes to take action with regard to "blackout periods" for political advertising in primary and general elections, and for "automatic recusal provisions for judges who receive more than an established amount in judicial elections"

As mentioned previously, the one proposal of the Majority Report that the Minority most strongly opposes is the change to a political appointment system for judicial candidates. The phrase "merit selection" is a misnomer. The Minority believes that an appointment system will fail to address the influence of money and politics in judicial elections. In fact, the Minority Members believe that an appointment system may further erode public confidence in the selection of judges based upon a survey which showed that 76% of people believed that money

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(f) Every person who has spent a total of five thousand dollars or more for the direct costs of purchasing, producing or disseminating electioneering communications during any calendar year shall maintain all campaign related financial records and receipts for a period of one year following the filing of a disclosure pursuant to subsection (a) of this section. The records and receipts shall be available to the Secretary of State for the purposes of an audit as provided in section seven, article eight, chapter three of this code. Any person required to retain records pursuant to this subsection who willfully fails to maintain such records and receipts is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than five hundred dollars, or confined in jail for not more than one year, or both fined and confined.
(g) Within five business days after receiving a disclosure of electioneering communications statement pursuant to this section, the State Election Commission shall make information in the statement available to the public through the Internet.
(h) For the purposes of this section, a person is considered to have made an expenditure if the person has entered into a contract to make the expenditure.
(i) The Secretary of State is hereby directed to propose rules and emergency rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code in accordance with the provisions of this section.

had some influence on judicial decisions. *See, ABA Journal*, Mud and Money, pp. 40-45 (February 2005).

Further, the Minority Members believe that the West Virginia Constitution should not be changed to disenfranchise the citizens of West Virginia from the selection of their judges and justices. If changes are needed to limit the influence of money and politics, which they are, then changes should first be made to preserve the Constitutionally-established method of selection. If those changes are not effective, then more drastic changes, like the recommendation of the Majority may be revisited.

Accordingly, the Minority Members strongly urge this Board to reject the recommendation of the Majority and, instead, focus on ways of eliminating the influence of money and politics in the judicial election process while at the same time preserving the involvement of the people of West Virginia in the selection of their judges and justices.